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The Call for Statutory Tools in Urban Regeneration

- Recent Development of Danish Planning Legislation

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Key words: Public-private partnerships, PPP, urban renewal, urban regeneration, urban redevelopment, spatial planning, planning implementation, implementation tools, harbour redevelopment, neighbour interest, subsidy, co-financing, good governance, the rule of law, renewing Danish planning.

Abstract

Older industrial areas and harbor areas are undergoing dramatic transformations these years due to several alterations in some basic structures in society; e.g. globalization resulting in moving-out of manpower intensive production to low pay regions, changes in the structure of transports resulting in more land-based freight and less shipping, amalgamation of industries and re-location due to new localization parameters. As the case may be, these structural alterations bring about more or less abandoned and worn-down areas. Typically, the areas are located centrally in the towns. With that, they hold a substantial need for redevelopment and revitalization from an urban planning and management point of view as well as a considerable development potential, as the areas generally offer an attractive possibility for building new housing, offices and other white-collar workplaces.

However, redevelopment of these older business areas faces great challenges; especially compared to urban (re)development in general. The property structure and ownerships are often complex and need re-composition to meet new land uses, the soil may be polluted from former activities implying large clearing costs, the areas may have a low accessibility due to their localization between other built-up areas, and often the areas are not totally abandoned as they may still hold a few vigorous enterprises having an adverse impact on the environment.

Transformation of these 'brown areas' into new appealing parts of the towns requires that the planning authorities are able to overcome this kind of challenges. To do so they need appropriate skills and tools. The paper presents the statutory tools made available by means of a number of amendments to Danish legislation during the last decade. Next, the sufficiency of the statutory tools is discussed on the background of a number of cases on planning and implementation of urban regeneration in practice. The paper concludes that the development of Danish planning legislation has provided some useful tools, but the toolbox must still be considered somewhat insufficient compared to the challenges in practice.

The Call for Statutory Tools in Urban Regeneration

- In the Light of Recent Development of Danish Planning Legislation

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1. INTRODUCTION

Worn down and more or less abandoned industrial- and harbour areas became more and more visible in the Danish townscapes during the 1980'ies and 1990'ies. Some limited regeneration projects were carried through, but in general much public attention to these areas did not exist until the late 1990'ies where the regeneration challenge became an issue in the professional debate. Among other things, the absence of adequate tools to handle the transformation of the worn down areas became an issue. The tools provided by the Planning Act and related legislation at the time were designed to handle urban growth and were capable of managing small scale alterations within the built environment, too. But they were obviously insufficient to handle the complexity and size of the more or less abandoned industrial- and harbour areas¹. Moreover, the regeneration areas were putting new kinds of issues on the urban management agenda, e.g. extensive clearing needs (and -costs), uncertainty regarding if and when the individual sites might be abandoned, etc.

The urban, economic and spatial problems rising from structural development trends of society were subject to a committee work from 1999 through 2001. The work resulted in a number of recommendations comprising, inter alia, suggestions concerning new statutory tools to handle the spatial transformation of urban regeneration areas. In 2003, the recommendations of the committee were followed up through an amendment to the Planning Act, etc. Subsequently, more amendments to the legislation have been passed, the latest in 2007.

The incremental supplementation of the statutory toolbox has inevitably made it easier for the municipal authorities to solve some urban regeneration problems. The question is, however, to what extent the toolbox contains the necessary and sufficient tools to meet the regeneration challenge in the municipalities.

2. RECOMMENDATIONS OF THE 'URBAN POLICY COMMITTEE'

In 1999 the Minister of Housing established the Urban Policy Committee. Participants in the committee were representatives from the municipalities, counties and ministries and participants appointed by the Minister in person. The mandate had a broad objective as it was to discover barriers to a favourable business development as specified by the government in the so-called Urban Policy Statement (Statement R13 1998-1999). The statement defines 'urban policy' as systemic policies comprising business conditions, social conditions,

¹ Restoration of older residential areas, housing improvement and provision of open spaces has traditionally been handled through separate legislation (The Urban Renewal Act, etc.)

building- and housing conditions, conditions relating to urban planning, traffic, environment, energy supply, culture etc. The objective of the urban policy is, referring to the statement, to ensure consistency among the different urban interests and to provide the setting for a sustainable development – economically, commercially, socially and environmentally.

The committee report (Report no. 1397) notices that the internationalization intensifies the inter-municipal competition for attracting companies and their employees. The report points to the fact that old business- and infrastructure areas on the one hand often appear worn down with a bad image and on the other hand represent an opportunity to develop a more multifarious urban environment complying with companies' and employees' requests; that is, an opportunity to develop integrated, multifaceted and living cities. The report also point to the fact that a regeneration of these areas holds the potential to contribute to a sustainable development by restraining the area necessary for urban growth and in this way contribute to more compact cities entailing a decrease in the need for transportation by car. However, the report emphasizes as well that such redevelopments carry a risk of increased environmental impacts within limited areas.

In the report, several barriers are identified concerning revitalization, most of them posing economic and other kinds of uncertainties regarding the possibilities of future land use:

- the areas are not released completely and at the same time,
- the areas possibly hold soil pollution to a considerable but unknown extent,
- noise emitted from works may be a barrier to future mixed land use,
- complex conditions regarding property structure and land ownership,
- difficult transportation conditions and bad accessibility.

The report analyzes the present possibilities and new means to meet these challenges along with other tasks prompted by the urban policy. On this background, the committee submitted a number of suggestions. In the present context the following suggestions are considered of most relevance:

- provision of statutory authority to assign 'special urban regeneration zones' and to set up regeneration companies to operate in these zones. Furthermore, provision of one or more financial pools at the national level to cover economic losses for these companies if such losses occur in connection with the regeneration,
- provision of statutory authority to impose the costs connected with infrastructure investments on the investors, using uniform rules,
- preparation of guidance notes on the handling of noise problems (originating from traffic as well as companies),
- considerations concerning how to accept a minor, temporary non-conformity with the maximum permissible values regarding noise in the regeneration zones until the regeneration is completed,
- extension of the possibility given in the Planning Act to establish provisions regarding the sequential order for putting new urban land into use. The committee suggests that this possibility is extended to cover transformation of land use in existing urban areas.

As it appears some of the suggestions are directly related to spatial planning and environmental matters whereas others affect financial, fiscal and company law issues. In preparation for an assessment of the sufficiency of the statutory tools the changes in the legislation relevant to urban regeneration within these areas is analyzed in the following section.

3. TOOLS IN THE CURRENT WRITTEN DANISH LEGISLATION REGARDING RE-DEVELOPMENT



I: Re-development of a harbour area (source: Danish Ministry of The Environment)

Despite the Urban Policy Committee came up with several proposed amendments to the planning legislation to make municipalities able to manage urban regeneration, until mid 2007 the written Danish legislation only contained very few tools for carrying out urban re-development: Act no. 440 from 2003 made it possible for municipalities to point out old industrial areas as so-called ‘urban regeneration areas’ for future re-development. But the law can hardly in itself be considered containing any tools (see section 3.1).

However, a relatively old law regarding ‘Municipalities as Contractors for other Public Authorities and Municipal Participation in Private Companies’ - Act no. 384/1992 – has since 1992 allowed the formation of so-called re-development companies

registered as a limited company owned by municipalities jointly with private development companies. But this was not clear until few years ago as the authority to form such PPP¹-like redevelopment companies became a result of interpretation stated in (only) subordinate legislation. Originally, the law was never meant to promote urban re-development, and accordingly it has never been used as legal basis to form re-development companies. See further in section 3.2.

For lack of anything better municipalities and developers have had to be content with the other and traditional implementation tools (local planning etc.) which can be used in practice to start up, regulate and implement urban re-development (see section 3.3).

However, the need for clear boundaries for formation of PPP among others led in June 2007 by Act no. 537/2007 to the first set of implementation tools meant for urban regeneration - in the proper sense of the word. Due to the adoption of these tools municipalities were for the very first time given actual means to catalyse and smooth the urban redevelopment process; among others municipalities were authorised to form something like PPPs (see section 3.4).

3.1 Act no. 440/2003 – Designation of Urban Regeneration Areas (Amendment of the Planning Act)

The amendment of the Danish Planning Act in 2003 made it possible for municipalities to point out old industrial areas as so-called ‘urban regeneration areas’ for future re-development. The only precondition to point out an urban regeneration area in the municipal planning is that the industrial activity in the area has to be ceased or is being phased out in the large majority of the area; cf. paragraph 11 d, within c. 8 years, cf. paragraph 15 a.

Danish Planning Act

§15 a. [...]

Subsection 2. Local plans that are produced for lots in an area that the municipal plan has designated as an urban regeneration area may [...] designate noise-burdened land for noise-sensitive uses if the municipal council can ensure that the noise burden will end during a time period that does not substantially exceed eight years after the local plan adopted in final form has been published.

Source: Ministry of the Environment 2007

During these 8 years the situation in the area – e.g. commercial harbour area – will typically be that some of the enterprises already have closed down, while others still have ongoing production.

The amendment from 2003 does only – at the most - add one new (implementation) tools to the tool box: A transition period of 8 years to reduce noisy activity has been introduced to allow binding local planning for houses, offices and other ‘noise sensitive’ land use next to industrial enterprises. In other words, since 2003 it has been possible to exempt from the standard dB-noise limits within the first c. 8 years, and thus easier to start re-development before all enterprises are wound up and closed down.²

3.2 Act no. 384/1992 and Act no. 548/2006

Act no. 384/1992³ allows municipalities to participate in private companies selling products and services based on municipal knowledge. According to recent subordinate legislation from The National Agency for Enterprise and Construction (NAEC) it is assumed that the act also allows formation of so-called re-development companies registered as limited companies owned by municipalities jointly with private development companies.

As a principal rule municipalities may not own the majority of the shares, and the invested share capital of a municipality has until 2006 been limited to 10 million DKK⁴. However, the share capital limit has almost as a matter of routine been exempted up till 50 million DKK. The two restrictions shall be seen in the light of the wide range of legal doctrines of the so-called ‘municipal authority’ (see section 3.3.4) that among others seeks to prevent the public sector to inflict the private sector on inequitable competition, and to avoid or prevent potential waste of the taxpayers money.

But in itself Act no. 384/1992 did only add little news to the state of the law. At best it can be considered as an interim act allowing co-operation between public authorities and the private sector – despite it does not mention PPP explicitly.

Whatever a PPP is formed on legal basis on Act no. 384/1992 or not, the PPP is in any circumstances fundamentally subordinate to the – very complex and user-unfriendly – unwritten legal doctrines of the ‘municipal authority’ developed through administrative practice and case law (see section 3.3.4).

Probably therefore, Act no. 384/1992 has not yet been used as legal basis for forming PPPs.

3.3 The ‘Traditional’ Implementation Tools

To start up, regulate and implement re-development municipalities have instead been referred to the old traditional implementation tools: Local planning, compulsory purchase, (threat of) rejection of planning and building permission, ‘municipality authority’, and easements and other agreements in the frame of civil law.

3.3.1 Local Planning

Binding local plans are unavoidable when urban regeneration areas are to be re-developed. Pursuant to the Planning Act (cf. paragraph 13,2) *“A local plan shall be produced before large areas are parcelled out and before major development projects, including demolition, are carried out, and also when it is necessary to ensure the implementation of the municipal plan”* (Ministry of the Environment 2007. p. 16).

In a binding local plan the municipality can regulate a wide range of land use factors in details (cf. paragraph 15, subsection 2 – as it looked before June 2007).

When it comes to implementation the local plan tool is less appropriate. However, paragraph 15, subsection 2 no. 11-13 and 18 provide the municipalities a few tools for implementation. For example no. 11 which gives municipalities the right to demand construction of common facilities (e.g. recreational areas, etc. – and perhaps even kindergartens) in the local plan area as a precondition for a landowner to get permission to utilize a new building or construction (commissioning certificate)⁵.

Similarly, establishing of noise shields and insulation against noise can be demanded prior to permission to utilize new houses and offices.

Finally, the municipalities can dictate establishment of landowners’ associations, including compulsory membership, and they can regulate the rights and obligations of the association to take responsibility for establishing, operating and maintaining common areas and facilities.

These four legal provisions are together quite powerful implementation tools to secure some private co-financing of social and technical infrastructure – despite their application are of course limited. Especially the reach of no. 11 must be considered as limited regarding kindergartens etc. At least from the point of view of the two authors of this paper, it is doubtful⁶ if this provision can be used to demand kindergartens co-financed by private

individuals and corporations, because the costs to build and run such (common) facilities are in Denmark per tradition covered by municipal income-tax. In other words, here seems to be an inconsistency between the planning legislation and the ‘municipality authority’ (see further section 3.3.4 and chapter 4).

Danish Planning Act, paragraph 15, subsection 2 (as before June 2007)

A local plan may contain provisions on:

- 1) transferring areas covered by the plan to an urban zone or a summer cottage area;*
- 2) the use of the area, including reserving specific areas for public use;*
- 3) the size and extent of properties;*
- 4) roads and paths and other matters related to traffic, including the rights of access to traffic areas and with the intent of separating different kinds of traffic;*
- 5) the location of tracks, pipes and transmission lines, including electric power lines;*
- 6) the location of buildings on lots, including the ground level at which a building shall be constructed;*
- 7) the extent and design of buildings, including provisions that regulate the density of residential housing;*
- 8) the use of individual buildings;*
- 9) the design, use and maintenance of undeveloped areas, including provisions that regulate the ground, fences, conservation of plants and other matters pertaining to plants, and the lighting of roads and other traffic areas;*
- 10) conserving landscape features in connection with the development of an area allocated to urban or summer cottage development;*
- 11) the production of or connection with common facilities located within or without the area covered by the plan as a condition for starting to use new buildings;***
- 12) providing noise-abatement measures such as plantings, sound baffles, walls or similar construction as a condition for starting to use new buildings or changing the use of an undeveloped area;***
- 13) establishing landowners' associations for new areas with detached houses, industrial or commercial areas or areas for leisure houses, including compulsory membership and the right and obligation of the association to take responsibility for establishing, operating and maintaining common areas and facilities;***
- 14) conserving existing buildings, so that buildings may only be demolished, converted or otherwise altered with a permit from the municipal council;*
- 15) keeping an area free from new construction if buildings may be exposed to collapse, flood or other damage that may endanger users' life, health or property;*
- 16) cessation of the validity of expressly mentioned negative easements if the continued validity of the easement will contradict the purpose of the local plan, and if the easement shall not lapse as a result of §18;*
- 17) combining flats in existing residential housing;*
- 18) insulating existing residential housing against noise;***
- 19) banning major construction projects in existing buildings, so that such projects may only be carried out with a permit from the municipal council or if they are required by a public authority in accordance with legislation; and*
- 20) the establishment of allotment associations for new allotment garden areas, including mandatory membership and the association's right and duty to adopt provisions that shall be subject to approval by the municipal council on the termination or annulment of contracts governing the right of use and on the relinquishment of the right to use allotment gardens.*

Source: Ministry of the Environment 2007

3.3.2 Compulsory Purchase

Pursuant to paragraph 47 in the Planning Act “*The municipal council may expropriate real property that is privately owned or private rights to real property when the expropriation is materially important in ensuring the implementation of urban development in compliance with the municipal plan or in realizing a local plan or town planning by-law*” (Ministry of the Environment 2007. p. 30).

In accordance with the text municipalities particularly have to satisfy two basic criteria. Firstly, a (lawful) municipal plan or binding local plan must be produced in advance as a basis for the expropriation. The plan is an absolute procedural prerequisite.

Secondly, the purpose of the expropriation must fulfil a ‘criterion of necessity’ cf. the phrase “...when the expropriation is materially important in ensuring...”. The phrase is equivalent to the Danish Basic Law, paragraph 73, which says compulsory purchase only can be used to enforce acquisition of land for substantial public or common purposes, and expropriation is always subject to payment of compensation. In other words, the ‘criterion of necessity’ – and thus municipalities’ right to expropriate – is a matter of proportionality. Only dominating public/common interests can give reasons for intervention in private property/landownership.

Compulsory purchase is undeniably the most efficient tool in the tool box (when the two basic criteria are fulfilled). But namely the ‘criterion of necessity’ that has to be satisfied limits the usability of the tool considerably.

3.3.3 (Threat of) Rejection of Planning and Building Permission

The second most efficient implementation tool is probably the municipalities’ power to (threat to) reject a planning and building permission.

The Planning Act, paragraph 14, gives the right to reject any building application – even those that are in accordance with the actual plans – if the rejection is motivated by matter-of-fact considerations/objective grounds. This also includes regrets of actual plans that lead to rejection of a building permission in order to change the actual planning.

Of course, municipalities easily will become liable to prosecution if they pursue subjective interests. So they have to take care – not only to avoid prosecution, but namely for reasons of good governance, democracy and the rule of law.

However, if municipalities can manage not to cross the line between objective and subjective grounds, the ‘(threat of) rejection’-tool is a very efficient and lawful tool in order to obtain negotiating strength.

3.3.4 The Municipal Authority (Kommunalfuldmagten)

Municipalities in Denmark are self-governed under supervision of the central government, cf. the Danish Basic Law paragraph 82. In addition they have the right to levy taxes (income tax and property tax).

The right of the municipalities to manage their own affairs independently and their local tax revenues are together what forms the ‘municipal authority’ (kommunalfuldmagten): The municipalities are free to decide how to use and spend their resources – in respect towards the legal doctrines (see below for the most important ones).

Many municipalities have sought to use the ‘municipal authority’ to attract industry and commerce to stimulate long term employment and - among others - to secure a high ‘retail profile’ in the cities. Municipalities normally consider good housing conditions, employment

and a good public service, local authority schools and institutions, public sport grounds, etc. as essential to maintain and attract new enterprises and taxpayers. Therefore, local authorities traditionally have used considerably economic resources on building social and technical infrastructure to support commercial and industrial undertakings to be set-up (Harder 1973, p.176-177).

Typically, support and financial aid from municipalities has taken form of guarantees for loans, buying and selling property or establishment of technical infrastructure (traffic circles, roads, road extensions, etc.) necessary for the new company, e.g. a superstore with a flow of car-borne costumers (Harder 1973, p. 100 and 177; Ministry of the Interior 1997, p. 283).

However, the usability of the financial aid-tool is limited. As principal rules – according to administrative practice and case law - local authorities can only use taxpayers money for the common good (“the common good criterion”) ; when it does not affect other municipalities considerably (“the jurisdiction criterion”) ; and local authorities’ intervention in the private sector with regard to distortion of the competition between companies is in general forbidden (“the intensity criterion”).

These criteria entail that local authorities are prevented from giving economic benefits or grants to particular commercial and industrial undertakings in order to attract them to the area. Nor may they make building sites or other facilities available at reduced costs. Competition between local authorities over the provision of grants to industry and commerce would directly and undesirably affect prices in particular industries and would result in the best equipped authorities having a further advantage (Harder 1973, p. 177).

“Local authority purchase and sale of property often occur in situations where there are no other buyers or sellers and where the transaction is not directly subject to the normal business principle of competition. In these circumstances it might be possible for a local authority, by buying dearly or selling cheaply, to bestow advantages on the other party of the deal which would clearly be illegal if they were conferred in the form of cash. Financial concessions are most frequently made in connection with sale of land to industrial enterprises to encourage them to build in the local authority’s area. Sometimes, too, a local authority has been tempted to purchase a factory building for cash and then lease the building cheaply for the extension of the factory with the object of preventing the enterprise from moving to another district” (Harder 1973, p. 101). Especially in the 1970’ies to mid 80’ies such actions were never approved by the national supervisory authorities. However, in recent times - after the supervisory authorities no longer shall approve land transactions in advance - there has been a softening compared to the former hard line.

When (indirect) financial support occurs through property transactions case law as well as administrative practice have shown that such transactions actually can be lawful if local authorities ensure that the financial support (i.e. the authority’s spending) is equivalent to (the “value” of) safeguarded “municipal interests” (Heide-Jørgensen 1993). Municipal interests that are namely accepted to give reasons for legal spending of taxpayer’s money to support private companies are: safeguarding of *local planning interests* and *infrastructure interests*, but among others also *environmental interests* (Garde & Revsbech 2002, p. 19). The

lawfulness to safeguard these interests by the ‘municipal authority’ is partly a tradition, and partly it goes hand-in-hand with the local authorities’ obligations according to the Planning Act and other legislation.

3.3.5 Easements and other Agreements in the Frame of Civil Law

To safeguard ‘municipal interests’ in relation to financial support of companies (cf. section 3.3.4), or to safeguard agreements in continuation of (threats of) rejection of planning and building permission (cf. section 3.3.3), easements are almost a natural choice.

Furthermore, easements can be used to secure more intensive and other regulation than municipalities are entitled to according to the Danish Planning Act, paragraph 15, subsection 2.

Municipalities can only impose easements on local authority owned properties. In case a property is private owned the municipality has to negotiate with the private landowner to convince him to impose an easement on his property. In such cases municipalities may – within the frame of objective grounds - use (threats of) rejection of planning and building permission to obtain negotiation strength.

Easements are in Denmark registered in the land register, and thus they remain in force and commit all current as well as new landowners. It is possible to register both independent declarations and agreements written in a contract of sale or a deed.

3.4 Act no. 537/2007 - Implementation Tools to Catalyse and Smooth the Urban Redevelopment Process (Amendment of the Planning Act)

During 2006/2007 the Danish parliament understood the municipalities’ need for further tools to manage the urban regeneration. Based on recommendations in the report ‘Renewing Danish Planning’⁷ the parliament adopted an amendment of the Planning Act containing a handful new tools; four of these in preparation for smoothing and catalysing urban redevelopment.

Danish Planning Act

Part 5a

Development agreements on infrastructure

§21b. At the request of a property owner, a municipal council may enter into a development agreement with the property owner for areas designated as urban zones in the municipal plan, cf. §11a, no. 1.

Subsection 2. Development agreements may be entered into with the aim of:

- 1) achieving a higher quality or standard of the planned infrastructure in an area;
- 2) accelerating the local planning for an area designated for development through local planning by the framework provisions of the municipal plan, including urban regeneration, but for which local planning would contradict the provisions on the chronological order of development of the municipal plan; or
- 3) change or extend the development opportunities listed in the framework provisions of the municipal plan or the local plan for the relevant area on the condition that the property owner must only contribute to financing infrastructure that the municipality would not be required to establish.

Subsection 3. The development agreement may solely contain provisions stipulating that the property owner in full or in part shall construct or pay the expenses for the physical infrastructural installations that are to be established inside or outside the area to implement the planning provisions. The agreement may further stipulate that the property owner shall pay the expenses for preparing the municipal plan supplement and the local plan.

Subsection 4. Information that a draft of a development agreement exists shall be publicized simultaneously with the publication pursuant to §24 of the proposal for the municipal plan supplement and the local plan. §26, subsection 1, shall similarly apply to information on the draft of a development agreement.

Subsection 5. The municipal council's entering into a development agreement shall be adopted simultaneously with the adoption of the local plan in final form, and information on the adoption of the development agreement shall be publicized. Information on the development agreement shall be accessible to the public. §31, subsection 1 shall similarly apply to the development agreement.

Source: Ministry of the Environment 2007

The amendment in 2007 – above all - contains legal bases to form voluntary public-private partnerships (PPP) by means of ‘development agreements’ to legalise private co-financing of infrastructure. Further more the amendment contains an extension of the ‘local planning-tool box’ to authorise – among others - planning regulation of water areas in harbours.

The new PPP-tool was meant to catalyse and smooth the urban redevelopment and regeneration process. Property owners may enter into voluntary development agreements with the municipality on contributing to the physical infrastructure, such as squares, streets and paths through planning for urban development or urban regeneration.

The fact that the development agreements are voluntary protects the land owners against “hidden” (i.e. unlawful) tax charging. In other words, municipalities are prohibited to charge landowners for infrastructure costs which are normally defrayed and budgeted by the local government. Only when the urban development results in extraordinary expenses, these expenses can be charged the landowners – i.e. when a higher quality or standard of the planned infrastructure in an area is to be achieved (cf. § 21b, subsection 2 no. 1); or when accelerating the local planning (cf. § 21b, subsection 2 no. 2); or when the development opportunities are changed or extended (cf. § 21b, subsection 2 no. 3).

The same logic - land owners are protected against “hidden” tax charging – is behind the fact that only ‘physical’ infrastructure, such as squares, streets and paths can be dealt with in a development agreement. ‘Social’ infrastructure – such as schools and kindergartens etc. – cannot be included due to the tradition that such infrastructure is in Denmark always defrayed and budgeted by the local government.

With these limitations, however, it is bounded how much this new ‘development agreement-tool’ actually can contribute to smooth and catalyse urban development and redevelopment. Due to the landowner-protection-based restrictions – including the fact that development agreements can only be signed at the request of a property owner - it can hardly be considered as a proactive tool for the municipalities/planning authorities.

Contrary to the ‘development agreements’ the extension of the ‘local planning-tool box’ seems somehow more efficient – in the sense of a proactive tool for the municipalities/planning authorities.

Firstly, due to the new extension of the ‘local planning-tool box’ – namely no. 21 - housing development and other noise-sensitive development can more easily take place in areas exposed to noise. That goes for the designated urban regeneration areas with the 8 years postponement to observe the noise threshold⁸ (cf. chapter 3.1). But it also goes for other land exposed to noise, cf. §15a, subsection 1. Thus, paragraph 15, subsection 2 nr. 21 provides the necessary

Danish Planning Act, paragraph 15, subsection 2 (as after June 2007 includes the new items 21-24)

A local plan may contain provisions on:

1)[...] transferring areas covered by the plan to an urban zone or a summer cottage area; [...]

21) insulating new residential housing against noise in existing residential areas or areas for mixed urban uses, cf. §11b, subsection 1, no. 2;

22) requiring that new residential housing be constructed as low-energy housing, cf. §21a;

23) the use of waters in an urban regeneration area, cf. §11d, within or in connection with the outer jetties of a harbour; and

24) the design of installations on waters in an urban regeneration area, cf. §11d, within or in connection with the outer jetties of a harbour, including damming and filling, establishing fixed installations and placing fixed or anchored installations or objects and the placing of boats intended to be used for other purposes than pleasure sailing, dredging or excavating etc.

Source: Ministry of the Environment 2007

§15a. A local plan may only designate land exposed to noise for noise-sensitive use if the plan can ensure that the future use will be without noise nuisance through noise-abatement measures, cf. §15, subsection 2, no. 12, 18 and 21.

Subsection 2. Local plans that are produced for lots in an area that the municipal plan has designated as an urban regeneration area may, regardless of subsection 1, designate noise-burdened land for noise-sensitive uses if the municipal council can ensure that the noise burden will end during a time period that does not substantially exceed eight years after the local plan adopted in final form has been published.

Source: Ministry of the Environment 2007

noise-abatement measure for the local planning authorities to start redevelopment in all noise-exposed urban areas – and even in a way that reduces potential neighbour conflicts and compensation claims between the new residents and noisy businesses.

Secondly, paragraph 15, subsection 2 no. 23 and no. 24 provides the local planning authorities legal basis for planning regulation of water areas in harbours. Generally, municipalities do not have sovereignty in water areas as they belong to the Danish central government. Damming and filling, establishing fixed installations etc. on waters normally have to be negotiated and approved by The Danish Coastal Authority, but since June 2007 the local planning authorities have been able to act as the sovereignty de facto is theirs – as long as they keep within or in connection with the outer jetties of a harbour.

Especially this extension of the municipalities’ powers to include waters in a harbour appears to smoothes the urban redevelopment process.

4. CONCLUSION ON THE TOOL-BOX

In Denmark, the statutory toolbox to handle urban regeneration areas has been extended in several stages in recent years. In 2003 the possibility to zone special urban regeneration areas as 'special planning areas' in the municipal structure plans was provided and it was made possible for the municipalities to manage the sequential order in which these areas are redeveloped. The precondition to do so is that the industrial activity etc. that burdens the environment "has ceased or is being phased out in a large majority of the area". Moreover, the municipalities were given the possibility to adjust the general threshold limit values regarding noise within these areas for a transition period "not significantly exceeding eight years". In 2006 the legal basis for the municipalities' participation in redevelopment companies with private parties was adjusted, but the amendment act only added little news to the state of law. In 2007 a further amendment was made to the Planning Act; providing some further tools to handle noise problems, to regulate water areas in harbors and to enter into development agreements on infrastructure at the request of a property owner.

4.1 There is Still Room for Improvement

Despite the latest amendment of the Planning Act in June 2007, there is still room for improvement compared to many other countries' legislation.

The extension of the 'local planning-tool box' to authorise planning regulation of water areas in harbours is probably the most auspicious. The other part of the amendment – the voluntary development agreements – is hardly an improvement of the state of the law. Firstly, because the development-agreements-tool is not proactive, as its usability rely on the landowners' initiative. Of course municipalities/local planning authorities, at least in theory, can put a pressure on the landowners to propose a development agreement - due to the municipalities' power to (threat to) reject a planning and building permission, cf. chapter 3.3.3. But municipalities will easily become liable to prosecution as they pursue subjective interests.

Secondly, the "new" development-agreements-tool actually is not new at all. Municipalities already had the same opportunities through the 'municipal authority' (kommunalfuldmagten), cf. chapter 3.3.4, which is still one of the most auspicious tools in the tool-box. But - except from the clarification in the amendment of the Planning Act in June 2007 which stressed that private co-financing as a principal rule is limited to physical infrastructure – the 'municipal authority' (kommunalfuldmagten) still and predominantly is a tool based on unclear and unwritten law. And that is a problem as it limits the usability of the tool.

4.2 Unclear and Unwritten Law Restricts the Urban Re-development Potential

Due to the user-unfriendliness, and thus the municipalities' uncertainty of the reach of the 'municipality authority' as an implementation tool, more written legislation and specific guidance in the field are necessary. It is almost to demand the impossible, if municipalities are expected to keep up with administrative practice and case law to be updated with the current legal position. Currently it is highly unclear under which circumstances and to what extent financial transactions may occur across the public and private sector. It would be appropriate at least to incorporate the legal doctrines from the 'municipal authority' in the

written legislation, e.g. the Planning Act. In that way municipalities would know when they can support development financially; when they can demand private co-financing – and when they cannot.

Another thing, clear legislation and guidance regarding the use of the other traditional tools would be expedient, too. Namely the reach of the Planning Act paragraph 15,2 no. 11 (regarding kindergartens etc.) is difficult as it is quite ambiguous to what extent kindergartens can be co-financed by private individuals and corporations when costs to build and run such (common) facilities per tradition are covered by municipal income-tax.

Finally, it would be desirable to have guidance on the legal boundaries regarding the power to (threat to) reject a planning and building permission. Without proper guidance or clear regulation municipalities risk crossing the thin line between (legal) objective and (illegal) subjective grounds when they attempt to obtain negotiation strength in their dialogue with investors and developers.

There are, in other words, quite many unclear points as regards the central implementation tools usable in connection with PPP and other interplay between local authorities and private actors. Firstly, this weakens the efficiency of the implementation tools, and thus restricts the urban re-development potential. Secondly, the unclear points endanger the rule of law as it means a latent risk that municipalities – by choice or accident - violate the civil rights of landowners, developers etc. who are subject to the local authorities' regulation and steering. And in addition local authorities run the risk to be liable for prosecution or compensation.

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¹ Public-Private Partnership

² For further description of the amendment Act no. 440, see (Aunsborg and Sørensen 2006, section 4.2).

³ Since 1. January 2007 replaced by Act no. 548, 08/06/2006 (Kommuners udførelse af opgaver for andre offentlige myndigheder og kommuners og regioners deltagelse i selskaber – *Municipalities as Contractors for other Public Authorities and Municipal Participation in Private Companies*) – only minor amendments compared to Act. 384/1992.

⁴ The share capital limit has recently been abolished by the amendment Act no. 548/2006.

⁵ In Denmark not only a planning and building permission is requested prior to construction, but also a commissioning certificate is requested before landowners can move in and utilize the building.

⁶ It is doubtful even though the purpose (of kindergartens etc.) is explicitly mentioned in the legislative history behind the Danish Planning legislation.

⁷ Made by researchers, consultants and civil servants; and financed by the Ministry of the Environment jointly with The Foundation Realdania.

⁸ 55 dB outdoor and 30 dB indoor (in habitation areas).